IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

against

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 565 F.2d 815 (1977) and is set forth as Appendix A, pages 1a-19a, annexed to the petition for certiorari.* It reversed the order of the United States District Court for the Southern District of New York which, in upholding Petitioners' constitutional jury trial right against a claim of collateral estoppel, had denied Respondent's motion for partial summary judgment relating to the question of liability. The opinion of the District Court was not officially reported. It appears at App. E, p. 26a.

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* Citation herein to pages of each of the five appendices annexed to the petition for certiorari will appear as follows: "App. , p. ".

Jurisdiction of this Court

The judgment of the Court of Appeals sought to be reviewed was entered November 1, 1977. App. B, p. 20a. The petition for rehearing and rehearing en banc was denied by orders dated December 20, 1977. App. C, p. 22a; App. D, p. 24a. The petition for certiorari was filed in this Court on March 17, 1978 and certiorari was allowed on May 1, 1978 (A 62a).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provision and Federal Rules Involved

The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rules 39(b) and (c) of the Federal Rules of Civil Procedure provide:

> "(b) *By the Court.* Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

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* Citation herein to pages of the Appendix filed herewith will appear as follows: "(A)".

> "(c) *Advisory Jury and Trial by Consent.* In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

Questions Presented

1. Did the Court below err in denying Petitioners their Seventh Amendment right to a jury trial of certain issues in this action on the basis of findings made in an earlier-tried non-jury action in which the jury trial right did not exist and to which Respondent was not a party?

2. Can the constitutional jury trial right, preserved by the Seventh Amendment as that right existed in 1791, be destroyed by a post-1791 change in the common law doctrine of collateral estoppel?

3. Does the decision below conflict with the decision of this Court in *Dimick* v. *Schiedt*, 293 U.S. 474 (1935)?

4. Did the Court below err in concluding that Petitioners lost their constitutional jury trial right in this action as to those issues determined in a Securities and Exchange Commission ("SEC") enforcement action

> (a) by not requesting a jury or an advisory jury in the SEC action, notwithstanding the fact that there never had been a right to a jury trial in the SEC action and Respondent had not been a party thereto, or

(b) by not seeking to have this action tried prior to the SEC action, notwithstanding the fact that this action could not have been made ready for, and brought to, trial before the trial of the SEC action?

Statement of the Case

This action was commenced on November 13, 1974 by Respondent, a former shareholder of Petitioner Parklane Hosiery Company, Inc. ("Parklane"), against the two Petitioners and 12 other defendants. The complaint (A 4a) alleged violations of §§ 10(b), 14(a) and 20(a) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. §§ 78j(b), 78n(a) and 78t(a), certain rules promulgated thereunder and the common law. Respondent demanded a trial by jury (A 4a).

The action followed an October 1974 merger, pursuant to the laws of the State of New York, whereby Parklane was returned to its former status as a private company. The complaint, seeking damages, challenged the validity of the merger and alleged that the related proxy statement dated September 24, 1974 (the "Proxy Statement") was deficient in a number of respects. The answer denied all of the material allegations of the complaint (A 15a). The action was certified as a class action and the notice thereof informed the class that "[t]he complaint seeks money damages for the members of the class" (A 20a, 21a).

While this action was still in its pre-trial stage, the SEC, on May 5, 1976, commenced an enforcement action in the United States District Court for the Southern District of New York against the two Petitioners (the "SEC action"). The SEC simultaneously moved, by order to show cause, for the same injunctive and ancillary relief sought in its

complaint. The SEC did not challenge the validity of the Parklane merger. Rather, the SEC's complaint and its motion were limited to a claim that the Proxy Statement was deficient in three respects.*

On May 20, 1976, Respondent moved (A 24a) to amend his complaint to include allegations of the same violations alleged in the SEC's complaint and to add a claim for rescission. While Respondent's motion to amend the complaint was pending, the trial of the SEC action was ordered to commence on June 2, 1976. The trial, to the Court alone, was concluded on June 7, 1976; decision was reserved.

At the time the SEC action was commenced and tried, this action was not ready for trial. Pre-trial discovery was far from complete. While there were then outstanding notices by both sides to take certain depositions, the only discovery in this action had been the production of certain documents by Parklane.

On September 3, 1976, subsequent to the conclusion of the trial of the SEC action, Respondent's motion to amend the complaint was granted (A 24a). The amended complaint, served October 1, 1976, repeated Respondent's jury demand (A 25a). The answers denied all of the material allegations of the amended complaint (A 38a, 45a).

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* The SEC action was entitled *Securities and Exchange Commission* v. *Parklane Hosiery Co., Inc., Herbert N. Somekh*, 76 Civ. 2024 (KTD). The SEC's complaint and motion were based upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); §§ 10(b), 13(a) and 14(a) of the 1934 Act, 15 U.S.C. §§ 78j(b), 78m(a) and 78n(a); and certain rules promulgated thereunder.

At the time the SEC action was commenced, the instant action was before District Judge Wyatt. The SEC action was assigned to District Judge Duffy. As the Court below was informed in response to its inquiry upon oral argument, Petitioners had applied in writing to Judge Duffy for reassignment of the SEC action to Judge Wyatt pursuant to the assignment rules of the District Court applicable to related cases. Petitioners' application was denied.

On November 9, 1976, the District Court (Duffy, J.) entered an Opinion and Order in the SEC action in which it found that the Proxy Statement violated § 14(a) of the 1934 Act and Rule 14a-9 thereunder in the three respects claimed by the SEC. *Securities and Exchange Commission* v. *Parklane Hosiery Co., Inc.*, 422 F. Supp. 477, *aff'd*, 558 F.2d 1083 (2d Cir. 1977).* Thereupon, Respondent, on November 24, 1976, moved for partial summary judgment against Petitioners (A 53a).

Respondent's motion was based upon a contention that Petitioners were collaterally estopped in this action by the findings of fact made in the SEC action. Petitioners, contending they were not so estopped, opposed the motion on the ground (a) that, in the SEC action, they had had no right to a jury trial; (b) that, in this action, they do have a right to the jury trial which Respondent himself had demanded; and (c) that Respondent, who was not a party to the SEC action, could not, through collateral estoppel, deprive Petitioners of their jury trial right in this action.

The District Court (Wyatt, J.) denied Respondent's summary judgment motion (App. E, p. 26a), relying upon *Rachal* v. *Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971), a case squarely in point. Respondent then moved, pursuant to 28 U.S.C. § 1292(b) and Rule 5, Fed. R.App.P., for certification of a question for appeal. The District Court granted the motion (A 55a) and the Court below granted the petition for leave to appeal (A 57a).

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* The District Court denied all of the relief requested by the SEC except to the extent that Parklane was directed to file, and Petitioner Somekh, its president, to cause to be filed, amendments to Parklane's prior filings with the SEC to reflect the three deficiencies found in the Proxy Statement. 422 F. Supp. at 487.

The question certified was as follows:

> "Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange Commission ('SEC') can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions." (A 55a-56a)

In its November 1, 1977 opinion, the Court below reversed the District Court. Expressly stating that it disagreed with the Fifth Circuit's decision in *Rachal, supra,* (App. A, p. 18a), the Court below held that Petitioners' jury trial right in this action as to issues of fact determined in the SEC action was extinguished, through collateral estoppel, on the ground that there had been a full and fair non-jury trial in the SEC action.

The Court below also concluded that the jury trial right in this action as to those issues determined in the SEC action had been waived, though Respondent had not claimed, and the District Court had not found, any such waiver. The Court below stated that the jury trial right had been waived because Petitioners had not (a) sought to expedite the trial of this action or (b) requested the District Court to try the SEC action to a jury or before an advisory jury pursuant to Rule 39(b) or (c), Fed.R.Civ.P. App. A, p. 14a.

This Court allowed certiorari by order filed on May 1, 1978 (A 62a).

Summary of Argument

The decision below represents the first time that the right of trial by jury, as it existed in 1791 and was preserved by the Seventh Amendment, has been extinguished by a post-1791 change in the common law. The Court below held that Petitioners were collaterally estopped from trying to a jury in this action those issues which had been determined in the earlier-tried SEC action in which a jury trial right never existed and to which Respondent had not been a party.

I. The decision below denied Petitioners their constitutional jury trial right on the basis of the relatively recent judicial relaxation of the requirement of mutuality of estoppel.* It is, therefore, in conflict with the long-established principle, enunciated by this Court in *Dimick* v. *Schiedt, supra,* that a post-1791 change in the common law cannot be invoked to extinguish the Seventh Amendment jury trial right as that right existed in 1791.

II. In the absence of mutuality, the application of collateral estoppel is not automatic, but depends upon considerations of justice and equity. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra,* 402 U.S. at 333-334. Where there is no mutuality, collateral estoppel may not be applied to extinguish a Seventh Amendment jury trial right. *Rachal* v. *Hill, supra.*

The Fifth Circuit, in *Rachal*, in circumstances indistinguishable from those here, correctly held that defendants in

* Mutuality of estoppel means that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 320-321 (1971).

a private action for damages under the federal securities laws could not be deprived of their jury trial right on the basis of findings made in an earlier-tried SEC enforcement action. The Fifth Circuit perceived the injustice of depriving the defendants in that case of the jury trial right they would have had, had the *Rachal* plaintiff been a party to the SEC action and therein presented his claim for damages. But for the decision below, *Rachal* has been consistently followed.*

III. Not only is the decision below admittedly in conflict with *Rachal,* but such conflict is based on diametrically opposite interpretations of this Court's decision in *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959). In assuming that a full and fair prior trial to a court alone was sufficient to extinguish a jury trial right in a subsequent action, the Court below misconstrued *Beacon Theatres* and this Court's subsequent decision in *Meeker* v. *Ambassador Oil Corp.,* 375 U.S. 160 (1963), *rev'g mem.,* 308 F.2d 875 (10th Cir. 1962).

IV. The Court below erred in holding that Petitioners waived their jury trial right in this action by not having it expedited and tried prior to the trial of the related SEC action. At the time the SEC action was commenced and tried, the procedural posture of the two cases did not permit this action to be readied for trial and tried first. The Court below also ignored the well-established policy that the trial

* *Securities and Exchange Commission* v. *Standard Life Corp.,* 413 F. Supp. 84 (W.D. Okla. 1976); *McCook* v. *Standard Oil Corp.,* 393 F. Supp. 256 (C.D. Cal. 1975); *Cannon* v. *Texas Gulf Sulphur* Co., 323 F. Supp. 990 (S.D.N.Y. 1971). *See also Allegheny Airlines, Inc.* v. *United States,* 504 F.2d 104, 111 n.7 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975); *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.,* 453 F.2d 1177, 1184 (3d Cir. 1972); *Stewart* v. *United Australian Oil, Inc.,* [1974-75 Transfer Binder] CCH Fed. Sec. L. Rep. ¶95,019 (S.D.N.Y. 1975).

of an SEC enforcement action may not be delayed by private litigation.

V. The Court below erred in holding that Petitioners waived their jury trial right in this action by not requesting a jury trial in the SEC action. The absence of such a request could not result in any waiver. Such a request would have been groundless and futile. The courts, including the Court below, have uniformly held that the jury trial right does not exist in an SEC enforcement action.

VI. Finally, the Court below erred in holding that Petitioners waived their jury trial right in this action by not requesting the SEC action to be tried before an advisory jury. The absence of such a request could not result in any waiver. An advisory jury could not have satisfied Petitioners' Seventh Amendment jury trial right.

ARGUMENT

I

The Court below extinguished Petitioners' jury trial right in derogation of the Seventh Amendment's preservation of that right as it existed in 1791 and contrary to this Court's interpretation of that Amendment.

The Seventh Amendment, adopted in 1791, provides that the jury trial right "shall be preserved." Departing from that mandate, the Court below relied upon the relatively recent judicial relaxation of the requirement of mutuality to extinguish Petitioners' jury trial right through collateral estoppel. In so doing, the Second Circuit reached an unprecedented result which cannot be reconciled with the Seventh Amendment and this Court's interpretation of it.

A. The scope of the Seventh Amendment must be determined by reference to the rules of the common law in 1791.

The decision below is at odds with the teachings of this Court and the test it formulated and repeatedly applied in resolving Seventh Amendment questions. *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974); *Curtis* v. *Loether*, 415 U.S. 189 (1974); *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654 (1935); *Dimick* v. *Schiedt*, *supra*. In *Dimick*, *supra*, this Court wrote:

> "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." 293 U.S. at 476.

The application of that test was illustrated in *Pernell*, *supra*, where the jury trial right was upheld in an eviction action brought under a District of Columbia statute. There, this Court wrote:

> "Had Southall Realty leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury." 416 U.S. at 373-374. (footnote omitted)

Notwithstanding the fact that the long-established historical test enunciated in *Dimick* has been consistently followed by this Court, the Court below mistakenly believed that the historical test "has been somewhat weakened by recent pronouncements," App. A, p. 16a, and stated that, in any event, it could not successfully make such an historical inquiry. App. A, p. 17a. Thus, in respect of actions for

damages under the federal securities laws, the Court below wrote that it could not "by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period." App. A, p. 17a. To the contrary, a determination can readily be made as to the rules applicable in the circumstances here.

Not only has this Court stated that it is " 'a matter too obvious to be doubted' " that a Seventh Amendment jury trial right exists in respect of claims for damages brought under post-1791 statutes, *Curtis* v. *Loether, supra,* 415 U.S. at 193; *Pernell* v. *Southall Realty, supra; see Schine* v. *Schine,* [1969-70 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 92,552 (S.D.N.Y. 1970); *Richland* v. *Crandall,* 259 F. Supp. 274 (S.D.N.Y. 1966), but the decisions of this Court demonstrate that in 1791 where, as here, there was no mutuality, collateral estoppel could not have been invoked. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.,* 225 U.S. 111, 127 (1912); *Brooklyn City and Newtown R.R. Co.* v. *National Bank of the Republic of N.Y.,* 102 U.S. 14 (1880); *see Mutual Benefit Life Insurance Co.* v. *Tisdale,* 91 U.S. 238 (1876); *Barr* v. *Gratz's Heirs,* 17 U.S. 213 (1819). Hence, in 1791, collateral estoppel could not have been invoked—as it was here—to extinguish a jury trial right.

It is thus apparent that the Court below had no basis for applying collateral estoppel to extinguish Petitioners' jury trial right. Indeed, the error of the Court below is also seen in its acknowledgement of the "absence of any 1791 authority for extension of the equitable doctrine of collateral estoppel to the present case." App. A, p. 18a.*

* While the Court below noted that the 1791 law courts "respect[ed] decrees and findings in equity" (App. A, p. 18a), it overlooked the fact, relevant here, that in the absence of mutuality those courts refused to give such decrees and findings any estoppel effect.

To reach its unprecedented result, the Court below speculated that the 1791 courts might "perhaps" have created an exception to the mutuality requirement simply because it was the government, here the SEC, which had obtained a prior judgment. App. A, p. 17a. There was no basis for such speculation. No such exception was recognized or created by the 1791 courts. *See Mutual Benefit Life Insurance Co.* v. *Tisdale, supra.*

In *Mutual Benefit,* this Court illustrated the principle that a 1791 private litigant, who was a stranger to an earlier-tried action brought by the government, could not invoke the findings made in that action through estoppel in a private action. As this Court wrote:

> "If an indictment for an assault and battery by A upon B is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A upon a subsequent indictment for the same offense; but, if B sues A for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose, it is *inter alios acta.* B was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefitted by it." 91 U.S. at 244.

Similarly, in the very article relied upon by the Court below (App. A, p. 18a), the authors, referring to the state of the law in 1791 in relation to *Rachal* v. *Hill,* wrote:

> "[L]imitations on the doctrine of collateral estoppel—in particular the doctrine of mutuality—would have made it impossible for [plaintiff] to deprive [defendants] of a jury on the issue of liability in an analogous proceeding in 1791 . . ." Shapiro and

Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal* v. *Hill*, 85 HARV.L.REV. 442, 454 (1971).

In short, since, in the circumstances here, collateral estoppel could not have been applied in 1791, it cannot be invoked to extinguish Petitioners' jury trial right.

B. A post-1791 change in a common law doctrine cannot diminish a Seventh Amendment jury trial right.

The fact, noted by the Court below (App. A, p. 8a), that relatively recently the common law requirement of mutuality of estoppel has been relaxed in some cases cannot affect, let alone extinguish, Petitioners' right to a jury trial here. *See Dimick* v. *Schiedt, supra.* None of those cases involved a question of the jury trial right. In no instance had the jury trial right been denied through any relaxation of the mutuality requirement.*

Indeed, this Court, contrary to the unprecedented result reached by the Court below, had made it crystal clear that the constitutionally preserved right to a jury trial is supreme and cannot be lost through a post-1791 change in a common law doctrine. Thus, in *Dimick*, this Court wrote:

> "It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. Funk v. United States, 290 U.S. 371. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." 293 U.S. at 487.

* Collateral estoppel could be applied as to a legal issue in the absence of mutuality only where, unlike the case here, the constitutional right to trial by jury has been satisfied by an opportunity to try that issue to a jury in a prior action. *See, e.g., United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709, 729 (E.D. Wash. 1962), *aff'd in part, modified in part on other grounds sub nom. United Air Lines, Inc.* v. *Wiener*, 335 F.2d 379, 404 (9th Cir. 1964).

In denying Petitioners the benefit of the constitutional principal enunciated in *Dimick*, the Court below relied upon a demonstrably irrelevant difference between the claim asserted in *Dimick*—a personal injury case—and the claim here. App. A, pp. 16a-17a. However, since here, as in *Dimick*, the constitutional jury trial right exists, the fact that the claims asserted were different cannot impair the applicability in each case of the constitutional principle enunciated in *Dimick*.

C. The Court below erred in believing that the historical test formulated by this Court for determining the scope of the Seventh Amendment has been "somewhat weakened."

Apparently misapprehending *Dimick* and subsequent decisions of this Court which also have held that the Seventh Amendment jury trial right, as it existed in 1791, "shall be preserved", *e.g., Pernell* v. *Southall Realty, supra; Curtis* v. *Loether, supra*, the Court below apparently thought that *Ross* v. *Bernhard*, 396 U.S. 531 (1970), "somewhat weakened" that requirement and could justify its denial of the jury trial right as it existed in 1791. App. A, pp. 15a-16a.

It is respectfully submitted, however, that *Ross, supra*, did not in any respect "weaken" the requirement of the historical inquiry. Rather, *Ross* simply stated that the historical inquiry happened to be the "most difficult" to

apply among three factors bearing upon the question whether a particular issue was " 'legal' " in nature. As this Court, in *Ross*, wrote:

> "Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 n.10.

It is one thing to say, as in *Ross*, that the "required" historical inquiry is difficult; it is an entirely different matter to say, as the Court below did, that because a principle is difficult to apply the principle has been "somewhat weakened". *Ross* simply stands for the proposition that an enlargement of the jury trial right beyond its 1791 boundaries is consistent with the Seventh Amendment.*

Nor was the requirement of the historical inquiry weakened by *Bloom* v. *Illinois*, 391 U.S. 194 (1968), as the Court below thought. App. A, p. 16a. *Bloom* involved the Sixth Amendment jury trial right and its expansion to criminal contempt proceedings to an extent which had been unknown at common law. On the basis of an historical inquiry, *Bloom*, as did *Ross*, recognized that there is no constitutional barrier to the expansion of the right to trial by jury. Contrary to the mistaken belief of the Court below, in no respect did either *Ross* or *Bloom* suggest that the historical inquiry need not be made or that the Seventh Amendment jury trial right as it existed in 1791 could thereafter be curtailed.

Accordingly, it is respectfully submitted that the unprecedented curtailment of the jury trial right by the Court below constitutes a violation of the Seventh Amendment mandate that the jury trial right "shall be preserved" and an unwarranted deprivation of Petitioners' jury trial right.

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* In enlarging the jury trial right, this Court, in *Ross*, held there was a jury trial right in a stockholders' derivative suit for damages, though such actions were traditionally cognizable only in equity and, consequently, had not been triable to a jury as of right.

II

While in the absence of mutuality collateral estoppel may be applied in some circumstances, it may not be applied to extinguish the jury trial right.

The Fifth Circuit in *Rachal, supra,* and the Second Circuit in this case, recognized that the requirement of mutuality of estoppel has recently been relaxed. They are in conflict, however, as to whether, in the absence of mutuality, a constitutional jury trial right may be destroyed through collateral estoppel. The Court below believed that as long as there had been a full and fair trial to a court alone in an action in which the jury trial right never existed, a stranger to that action could invoke collateral estoppel to destroy the jury trial right in a second action. The Fifth Circuit, to the contrary, had held that in such circumstances collateral estoppel could not be invoked and that preservation of the jury trial right was required.

According to the Fifth Circuit, the fact that there had been a full and fair trial is not enough to permit the application of collateral estoppel in the absence of mutuality. The Fifth Circuit, unlike the Second Circuit, held that it was also necessary to consider whether the application of collateral estoppel would result in an injustice to the party against whom it is asserted. Thus, in *Rachal,* the Fifth Circuit wrote:

> "While the requirement of mutuality need no longer be met, the doctrine of collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and that application of the doctrine will not result in an injustice to the party against whom it is

asserted under the particular circumstances of the case." 435 F.2d at 62. (citations omitted)

The same standards had been earlier stated by the Third Circuit in *Bruszewski* v. *United States*, 181 F.2d 419, 421, *cert. denied*, 340 U.S. 865 (1950). They were confirmed by this Court in *Blonder-Tongue*, *supra*.

Blonder-Tongue represented the first time this Court permitted the application of collateral estoppel in the absence of mutuality. There, in permitting collateral estoppel to be applied defensively, this Court expressly stated that the question of the offensive use of collateral estoppel—the question presented here—was not before it. 402 U.S. at 330. *Blonder-Tongue* also noted that the authorities have been more willing to permit the defensive, rather than the offensive, use of collateral estoppel. 402 U.S. at 329-330.

Even when asserted defensively, *Blonder-Tongue* taught that collateral estoppel may not be applied pursuant to an "automatic formula," but depended upon considerations of "justice and equity". 402 U.S. at 334. This Court wrote:

> "But as so often is the case, no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity." 402 U.S. at 333-334.*

Though the Court below, in applying collateral estoppel to extinguish the jury trial right, indicated reliance upon *Blonder-Tongue* (App. A, p. 8a), it overlooked the sig-

* Similarly, in *Bruszewski*, *supra*, to which *Blonder-Tongue* accorded precedential value, 402 U.S. at 324-325, the Third Circuit cautioned that when "some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case," collateral estoppel, in the absence of mutuality, may not be applied. 181 F.2d at 421.

nificant fact that *Blonder-Tongue* had no occasion to consider whether, and did not suggest that, collateral estoppel would apply where, as here, a jury trial right was at stake. In this regard, *Beacon Theatres* left no doubt that where the exercise of discretion might affect the jury trial right, a court must, wherever possible, preserve that constitutional right:

> "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." 359 U.S. at 510. (footnote omitted)*

That same principle was followed by the Fifth Circuit in *Rachal*, but disregarded by the Court below. The Fifth Circuit perceived the injustice of depriving the defendants in that case of the jury trial right they would have had, had the *Rachal* plaintiff been a party to the prior SEC enforcement action and had therein presented his claim for damages. 435 F.2d at 64. *See Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, *supra*, 453 F.2d at 1183-84; *see also Allegheny Airlines, Inc.* v. *United States*, *supra*, 504 F.2d at 111 n.7. The Fifth Circuit, in language apposite here, wrote:

> "In light of the great respect afforded in *Beacon Theatres*, supra, and its progeny, for a litigant's

* This principle is consistent with the strong federal policy favoring the jury trial right. *See Simler* v. *Conner*, 372 U.S. 221 (1953); *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, *rehearing denied*, 357 U.S. 933 (1958). In *Byrd*, this Court, in a diversity action, ordered a jury trial of an issue which, had the action been tried in the state court, would have been determined by the court alone. While recognizing that as a result of its holding the litigation could come out one way in the federal court and another way in the state court and acknowledging the policy against such a result, this Court reached its decision on the ground that the federal policy favoring jury trials was the paramount consideration. 356 U.S. at 537-39.

right to have legal claims tried first before a jury in an action where legal and equitable claims are joined, it would be anomalous to hold that the appellants have lost their right to a trial by jury on the issue of whether they are liable to respond in damages for violations of the security laws because of a prior adverse determination by the district court of the same issue in an action in which their present adversary was not a party and which arose in a different context from the present action. *Beacon Theatres*, supra, makes it clear that had Hill been a party plaintiff in the S.E.C. injunction action and there presented his claim for damages, the appellants would have received a jury trial on the issue of liability. It hardly makes sense that Hill can now assume a position superior to that to which he would have been entitled if he had been a party to the prior action. Accordingly, we hold that the application of the doctrine of collateral estoppel was not appropriate in view of the particular circumstances presented by this case and that the district court erred in granting summary judgment on the issue of liability." 435 F.2d at 64.

Similarly, in *McCook* v. *Standard Oil Corp., supra,* the Court balanced the "policy" favoring an end to litigation against preservation of the "strong policy" favoring the right to trial by jury. It concluded, contrary to the decision below, that where, as here, a court is called upon, in its discretion, to apply collateral estoppel in the absence of mutuality, a party should not be estopped where it had had no right to trial by jury in the first action. Enunciating the supremacy of the jury trial right over the policy of finality, the Court wrote:

> "Since these cases clearly show that collateral estoppel is not always applied offensively in the

> absence of mutuality, it would seem appropriate for this court to refuse to apply the doctrine when (1) the defendant had no right to a jury trial in the first action and (2) the plaintiff was not a party to the prior action in equity, but now seeks to use the earlier equitable decree as a sword against the defendant in an action at law. By carving this small exception into the offensive use of collateral estoppel, the court slightly compromises the policy favoring an end to litigation and preserves the strong policy favoring jury trial." 393 F. Supp. at 258.

It is respectfully submitted that the unprecedented application of collateral estoppel by the Court below to deny Petitioners their jury trial right was contrary not only to the Seventh Amendment, but also the strong federal policy favoring the jury trial right.

III

The Court below erred in construing *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), to support its denial of Petitioners' jury trial right.

The Second Circuit here, and the Fifth Circuit in *Rachal, supra,* arrived at their conflicting results on the basis of diametrically opposite interpretations of this Court's decision in *Beacon Theatres, supra.* While the *Rachal* Court found *Beacon Theatres* to exemplify this Court's "great respect" for the jury trial right, 435 F.2d at 64, and upheld it against collateral estoppel, the Court below thought that *Beacon Theatres* evidenced this Court's "inherent respect for the doctrine of collateral estoppel" (App. A, p. 13a) and extinguished that right. However, *Beacon Theatres* and this Court's subsequent decision in *Meeker, supra,* show that

as between the constitutional jury trial right and the common law principle of collateral estoppel, the jury trial right is supreme.

In *Beacon Theatres*, this Court held that, in a single action presenting claims for equitable and legal relief, mandamus should issue to compel a jury trial of the common issues. Since in *Beacon Theatres* there was mutuality, had the trial court, without a jury, first tried the common issues, trial of the legal claim to a jury might have been precluded. 359 U.S. at 503-504. To preserve the jury trial right against possible destruction by estoppel, this Court held that the common issues should be tried first, to a jury. *Accord*, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962).

Significantly, neither *Beacon Theatres* nor *Dairy Queen*, *supra*, reached the question whether the right to a jury trial of the common issues would in fact have been lost had the equitable claims first been tried to a court alone. That question was subsequently presented to this Court in *Meeker*. The Court below, however, apparently without taking *Meeker* into account, assumed, on its reading of *Beacon Theatres*, that a prior trial of equitable claims would result in loss of the jury trial right of issues common to legal claims. App. A, pp. 10a-11a. *Meeker* disproves such an assumption and the interpretation given *Beacon Theatres* by the Court below.

In *Meeker*, plaintiffs asserted both legal and equitable claims, which presented common issues, and demanded a jury. The trial court, however, tried and determined the equitable claim—and perforce the common issues—adversely to plaintiffs. As a result, plaintiffs were precluded from relitigating those issues to a jury on the legal claim. Plaintiffs thereupon appealed, claiming that they had been denied their jury trial right. The Court of Appeals for the

Tenth Circuit rejected plaintiffs' contention.* 308 F.2d at 884.

Though in *Meeker* plaintiffs had not sought mandamus to protect their jury trial right and there was no question that they had been accorded a full and fair trial by the court alone, this Court, on the basis of *Beacon Theatres* and *Dairy Queen*, reversed the Court of Appeals and thereby preserved the jury trial right against destruction by estoppel. Plaintiffs were thereby afforded a retrial, to a jury, of the very same issues which a court had tried and determined adversely to them.** Relying upon *Beacon Theatres* and *Dairy Queen*, the Sixth Circuit reached the identical result in *National Union Electric Corp.* v. *Wilson*, 434 F.2d 986 (1970). There the Court wrote:

> "When the Court denied trial by jury, the appellants could have filed an action in mandamus in this Court, or they could have moved to file an interlocutory appeal. Had they done either, they might have obtained the relief they are now seeking and thus they would have avoided the ten days' trial before the Court. Nothing in the papers before us, however, suggests that the defendants waived trial before a jury, and in our opinion they may review the order denying jury trial in an appeal taken after rendition of judgment." 434 F.2d at 988. (citations omitted)

Thus, contrary to the decision below, it is seen from *Meeker* and *National Union* that where, as here and in *Rachal*, there is a right to a jury trial that right may not

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* The facts in *Meeker*, *supra*, are discussed in the Court of Appeals decision, 308 F.2d 875; see 5 MOORE'S FEDERAL PRACTICE ¶38.11[8.-6] at 128.13 (2d ed. 1977).

** The fact of the retrial in *Meeker* appears in the District Court Docket, Civ. No. 8212 (W.D. Okla.), and the Judgment therein filed December 14, 1965.

be denied either (a) because a party had been "accorded a full and fair opportunity to try those issues in the prior [non-jury] proceeding" (App. A, p. 7a) or (b) because a party does not seek mandamus or take other measures prior to the non-jury trial.* Nor may the jury trial right be denied because of considerations such as finality and judicial economy. App. A, pp. 13a-14a. As *Beacon Theatres, Dairy Queen,* and *Meeker* show, and as the Fifth Circuit, in *Rachal,* recognized, such considerations must bow to the preservation of the jury trial right.** To borrow the words of this Court in *Curtis* v. *Loether, supra,* "these considerations are insufficient to overcome the clear command of the Seventh Amendment." 415 U.S. at 198.

Nor does *Katchen* v. *Landy,* 382 U.S. 323 (1966), support the interpretation given *Beacon Theatres* by the Court

* While the Court below relied on *Goldman, Sachs & Co.* v. *Edelstein,* 494 F.2d 76 (2d Cir. 1974), that case cannot support its conclusion that trial of the SEC enforcement action, without objection by Petitioners, resulted "in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues". App. A, p. 19a. To the contrary, as will be seen (pp. 27-32, *infra*), there were no valid grounds upon which to object to the trial of the SEC action. As seen in *Securities and Exchange Commission* v. *Wills,* [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,321 (D.D.C. 1978), any objection to the trial of that action would have been fruitless.

Goldman, Sachs in no respect has any relevance to the circumstances here. Unlike the SEC action here, in which the jury trial right had never existed, *Goldman, Sachs* involved the issuance of mandamus to avoid the loss, through collateral estoppel, of a jury trial in a private action where such right had existed but had been waived.

** The suggestion of the Court below that where there had been a full and fair non-jury determination of certain facts in a prior action there is no genuine issue as to those facts in a second action in which there is a jury trial right (App. A, p. 9a) begs the very question of the applicability of collateral estoppel. It is only where, unlike the case here, collateral estoppel can properly be invoked that findings in one action can be applied in a second action to render a factual issue undisputed.

below. App. A, pp. 12a-13a. In *Katchen,* in a summary proceeding in the bankruptcy court in which there was no jury trial right, a trustee in bankruptcy obtained a judgment against a creditor-claimant ordering the surrender of a voidable preference. The creditor contended that he was thereby deprived of the constitutional jury trial right he would have had had the trustee brought a plenary action and therein sought recovery of the preference.

This Court rejected the creditor's contention. It held that by presenting his claims in the bankruptcy court the creditor had voluntarily submitted himself to the jurisdiction of that court and, therefore, that court, in equity, could adjudicate any issues relating to his claims. As this Court wrote:

> "But although petitioner might be entitled to a jury trial on the issue of preference if he presented no claim in the bankruptcy proceeding and awaited a federal plenary action by the trustee, Schoenthal v. Irving Trust Co., 287 U.S. 92, when the same issue arises as part of the process of allowance and disallowance of claims, it is triable in equity." 382 U.S. at 336.

Though the creditor attempted to rely upon *Beacon Theatres* and *Dairy Queen,* this Court questioned whether those cases were at all applicable to *Katchen.* 382 U.S. at 339. It also noted that both those cases recognized that in certain situations a court could properly resolve an equitable claim first and thereby dispose of the issues involved in a legal claim. 382 U.S. at 340. Where, as in *Katchen,* there is mutuality, such a result would not be inconsistent with the Seventh Amendment's preservation of the jury trial right. Here, however, since there is no mutuality,

Katchen in no respect supports the denial of Petitioners' jury trial right.*

Finally, the validity of the Fifth Circuit's reading of *Beacon Theatres,* as contrasted with that of the Second Circuit, may also be seen in *Beacon Theatres'* reference to *Dimick* v. *Schiedt, supra.* Repeating what had been said in *Dimick,* this Court, in *Beacon Theatres,* wrote:

> "We granted certiorari, 356 U.S. 956, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.' *Dimick* v. *Schiedt,* 293 U.S. 474, 486." 359 U.S. at 501.

It is respectfully submitted that the *Rachal* Court, unlike the Court below, correctly understood *Beacon Theatres* as reflecting this Court's great respect for the jury trial right. The Fifth Circuit interpreted *Beacon Theatres* as this Court had in *Simler* v. *Conner, supra,* where *Beacon Theatres* was cited for the proposition that "[t]he federal policy favoring jury trial is of historic and continuing strength." 372 U.S. at 222. It is thus apparent that in *Rachal* the Fifth Circuit, in reliance upon *Beacon Theatres,* correctly upheld the jury trial right against a claim of collateral estoppel in circumstances indistinguishable from those here.

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* Two other inapposite cases relied upon by the Court below are *United States* v. *Utah Construction & Mining Co.,* 384 U.S. 394 (1965) and *H. L. Robertson & Assoc. Inc.* v. *Plumbers Local No. 519,* 429 F.2d 520 (5th Cir. 1970). App. A, p. 8a n.1. In each of those cases, unlike the case here, there was mutuality.

IV

The Court below, establishing an unprecedented and demonstrably untenable rule, erroneously held that the constitutional jury trial right in a private action for damages is waived where, as here, such action cannot be expedited and tried prior to the trial of a related SEC enforcement action.

Notwithstanding the fact (a) that a right to trial by jury did not exist in the SEC enforcement action and (b) that, at the time the trial of that action was ordered, this action was not ready for trial, the Court below concluded that the Seventh Amendment jury trial right in this action had been waived. App. A, pp. 18a-19a. Respondent certainly did not claim, and the District Court did not find, any such waiver. That question was first raised by the Court below, which did so on demonstrably untenable grounds.

Thus, the Court below ruled that Petitioners—the sole defendants in the SEC action but only two of the 14 defendants named in this action—should have sought "to expedite trial of the present action" to preserve their jury trial right. App. A, p. 14a. However, the trial of this action could not have been so expedited to avoid a prior non-jury determination of the common issues. The ruling not only was wholly unrealistic in light of the procedural posture of each of the cases, but also does violence to the well-established policy requiring SEC enforcement actions to be tried without being delayed by private litigation.

The SEC action was commenced on May 5, 1976 and ordered to trial on June 2, 1976. At that time, pre-trial discovery in this action was far from complete. There would have been no way, in the four weeks between the

commencement and the trial of the SEC action, for the parties to this action to have prepared for, and proceeded to, trial. This is to say nothing of the fact that Respondent's May 20, 1976 motion to amend his complaint in this action was not decided until September 3, 1976, months after the trial in the SEC action had been concluded.

Nor could Petitioners have stayed the trial of the SEC action until after this action was made ready for trial and tried. *Securities and Exchange Commission* v. *Wills, supra; see Securities and Exchange Commission* v. *Everest Management Corp.*, 475 F.2d 1236 (2d Cir. 1972); *Securities and Exchange Commission* v. *General Host Corp.*, 60 F.R.D. 640 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 1332 (2d Cir. 1975); *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 59 F.R.D. 305 (D.D.C. 1973).

In *Wills, supra,* defendants, relying upon the decision below, sought to preserve their jury trial right in certain private actions by moving for a stay of the trial of a related SEC enforcement action until after the private actions had been tried. In *Wills,* as was the case here, the private actions were not ready for trial at the time the SEC action was ordered to trial. The Court, finding that Congress had intended that SEC actions should proceed unobstructed by private litigation, denied the motion. The Court wrote:

> "The SEC is charged with statutory responsibility to vindicate the public interest. It perceives the threat of future violations and moves to prevent them. Congress was at pains to make it abundantly clear that the Commission in such circumstances should proceed unobstructed by private litigation.

> *See, e.g.*, S. Rep. No. 94-75, 94th Cong., 1st Sess. 76-77 (1975). The Commission is ready, discovery is completed, a trial date is set, and the case will proceed with trial to the Court." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at p. 93,072.

In *Everest Management, supra,* the Second Circuit also refused to delay an SEC enforcement action even to permit intervention by parties claiming to have been defrauded in the very transaction complained of by the SEC. There, Judge Timbers, a member of the panel below, wrote:

> "Appellants argue, accordingly, [on the basis of *Rachal* v. *Hill, supra*] that, unless intervention in the present SEC action is permitted, a total relitigation of the issues would be required in a subsequent action.
>
> "Suffice it to say that in our view it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." 475 F.2d at 1240 n.5.

The same policy was sounded in *General Host, supra,* where the Court stated:

> "'As a matter of general policy, it is undesirable that SEC actions for injunctive relief, whose sole purpose is the expeditious safeguarding of the public interest, be subjected to the delays that are inherent in private litigations, with their different concerns, even where those private actions parallel the SEC complaint.'" 60 F.R.D. at 641-642.

It is thus apparent that there is no merit whatsoever to the unprecedented and untenable rule established by the

Court below that to avoid waiver of the jury trial right in a private action for damages, such action must be expedited and tried prior to the trial of a related SEC action. Since this action could not have been so expedited and tried, there could not have been any such waiver.*

V

The Court below established an unprecedented and futile requirement in erroneously holding that Petitioners waived their jury trial right in this action by not having requested a jury in the related SEC enforcement action in which the jury trial right did not exist.

The Court below erroneously concluded that Petitioners waived their jury trial right in this action by not having requested the trial court in the SEC action to exercise its discretion, pursuant to Rule 39(b), Fed.R.Civ.P., to order that action to be tried to a jury. App. A, p. 14a. Such a conclusion is demonstrably untenable. Subsequent to the decision below, the Second Circuit itself found such a request to be groundless. *Securities and Exchange Commission* v. *Commonwealth Chemical Securities, Inc.*, [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 96,351 (1978).

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* Even if, *arguendo,* there were any merit to the waiver concept of the Court below, it is respectfully submitted that it should not have been applied here. Its application in this action was grossly unjust, particularly in view of the fact that the important jury trial right was at stake. The Fifth Circuit, in *Rachal, supra,* and the cases which followed it, represented, at the very least, highly respectable authority upon which Petitioners were entitled to, and did, rely. Indeed, the District Court in this case had also relied upon *Rachal* in refusing to permit collateral estoppel to extinguish Petitioners' jury trial right. App. E, p. 26a.

Since the decision below represented the first holding in conflict with established authority, it should not have been applied retroactively against Petitioners. *See England* v. *Louisiana Medical Examiners,* 375 U.S. 411, 422 (1964).

A jury trial under Rule 39(b) could not have been properly demanded in the SEC enforcement action. Rule 39(b) is expressly limited to "an action in which such a [jury] demand might have been made of right", and there certainly was no such right in the SEC enforcement action. *Securities and Exchange Commission* v. *Commonwealth Chemical Securities, Inc., supra; Securities and Exchange Commission* v. *Wills, supra; Securities and Exchange Commission* v. *Associated Minerals, Inc.,* 75 F.R.D. 724 (E.D. Mich. 1977); *Securities and Exchange Commission* v. *Petrofunds, Inc.,* 420 F. Supp. 958 (S.D.N.Y. 1976).

Accordingly, contrary to the decision below, Petitioners could not have waived their constitutional jury trial right in this action by not making a groundless Rule 39(b) request for a jury trial in the SEC action.

VI

The Court below erroneously held that Petitioners waived their jury trial right in this action by not having requested an advisory jury in the related SEC enforcement action, notwithstanding the fact that the use of an advisory jury could not satisfy a Seventh Amendment jury trial right.

The Court below also erroneously held that Petitioners waived their jury trial in this action by not having requested an advisory jury in the SEC action pursuant to Rule 39(c), Fed.R.Civ.P. App. A, p. 14a. An advisory jury could have had no bearing whatsoever upon Petitioners' Seventh Amendment jury trial right. *Securities and Exchange Commission* v. *Wills, supra.* "By its nature, the function of the advisory jury is to enlighten the conscience of the trial court and the jury's verdict has no binding effect upon that court." 5 MOORE'S FEDERAL PRACTICE

¶39.10[3] (2d ed. 1977); *Mallory* v. *Citizens Utilities Company*, 342 F.2d 796 (2d Cir. 1965); *(American) Lumbermens Mutual Casualty Co. of Illinois* v. *Timms & Howard, Inc.*, 108 F.2d 497 (2d Cir. 1939). Even where an advisory jury is used, the facts are to be found by the court, Rule 52(a), Fed.R.Civ.P., and the "review on appeal is from the court's judgment as though no jury had been present." *(American) Lumbermens Mutual Casualty Co. of Illinois* v. *Timms & Howard, Inc., supra*, 108 F.2d at 500.

In *Wills*, the Court, rejecting the suggestion made by the Court below regarding the use of an advisory jury, wrote:

> "The suggestion that an advisory jury might be used is, on analysis, misplaced. Defendants want to protect a perceived constitutional right to jury trial, but an advisory jury does not satisfy this right." [Current Transfer Binder] CCH Fed. Sec. L. Rep. at pp. 93,072-73.

It is respectfully submitted that, contrary to the decision below, to substitute for a jury, which a party has of constitutional right, an advisory jury, whose fact-finding is neither binding nor subject to review, would render the constitutional right illusory. Clearly, there could have been no waiver of Petitioners' Seventh Amendment jury trial right in this action merely because a request had not been made for an advisory jury in the SEC action.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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